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8

9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 QUENTIN L. KOPP,
12

13 Plaintiff,

14 v.

15 THE UNITED STATES SECRET SERVICE,
16

17 Defendant.
18

CASE NO. 3:18-cv-04913-JCS

**PLAINTIFF QUENTIN L. KOPP'S NOTICE
OF MOTION AND MOTION FOR
ATTORNEYS' FEES; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: May 3, 2019

Time: 9:30 a.m.

Ctrm: G, 15th Floor

Judge: Chief Magistrate Judge Joseph C. Spero

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 3, 2019, at 9:30 a.m., or as soon thereafter as may be heard, before the Chief Magistrate Judge Joseph C. Spero, located at 450 Golden Gate Avenue, Courtroom G, San Francisco, California, Plaintiff Quentin L. Kopp, will and hereby does move for an order awarding attorneys' fee.

Plaintiff's motion is based on this notice of motion, the memorandum of points and authorities in support of the motion, the Declaration of Mallory A. Barr, and the Declaration of Quentin L. Kopp filed herewith.

Dated: March 22, 2019

COTCHETT, PITRE & McCARTHY, LLP

By: /s/ Mallory A. Barr
MALLORY A. BARR

Attorneys for Plaintiff Quentin L. Kopp

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Quentin L. Kopp is a concerned tax-payer who was interested in the amount of tax-payer dollars being spent to protect President Trump's adult children as they promote the Trump-family's businesses overseas. To that end, on February 27, 2018, Mr. Kopp exercised his right under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *as amended*, to request information about such expenses from Defendant United States Secret Service.

Under FOIA, government agencies generally have twenty business days to respond to a request for information. Congress enacted the statute to facilitate public access to government documents and ensure an informed citizenry, vital to the functioning of a democratic society. Congress also included a fee-shifting provision should a requestor need to resort to the court to vindicate the public's statutory right to information.

However, the Secret Service failed to comply with its obligations under FOIA twice. First, the Secret Service in failing to timely respond to Mr. Kopp's initial February 27th letter, responding instead **24 business days** after it was received and requesting Mr. Kopp supplement his already narrowly tailored request with more specificity. The second time, after Mr. Kopp provided additional detail on May 29th, the Secret Service **failed to respond at all** to Mr. Kopp.

Mr. Kopp waited **over 50 business days** for a response to his May 29th supplemental detail, as requested by the Secret Service. No response came. Mr. Kopp was forced then to file a Complaint under FOIA to compel the Secret Service to respond to his request. It took another month after Mr. Kopp filed his Complaint for the Secret Service to produce records responsive to his February 27th request.

Throughout this process, Mr. Kopp was required to enlist the assistance of counsel to ensure his and the public's rights to access information were protected. Mr. Kopp brings this motion under FOIA for an award of reasonable attorneys' fees and costs of **\$41,884.95**. Fees are appropriate in this case because the litigation resulted in the release of records regarding a matter of continued public interest and importance and should have been promptly produced. Moreover, the fees sought by Mr.

Kopp are reasonable and appropriate. This Court should thus award Mr. Kopp his attorneys' fees and costs as requested in full.

II. FACTUAL BACKGROUND

A. Donald Trump Jr.'s U.S. Secret Service security detail for private business-related travels abroad was well documented by the news media.

On February 20, 2018, the President's son, Donald Trump Jr. ("Trump Jr.") arrived in India for a week-long visit on behalf of the Trump Organization. Throughout his trip to India, Donald Trump Jr. was accompanied by agents of the United States Secret Service, who provided for his security. Compl. ¶ 13 (citing Abi-Habib, Maria and Eric Lipton, "Selling, Not Diplomacy Draws a Trump to India," The New York Times, Vol. CLXVII, No. 57,877, 18 February 2018 at A1, A12).

Trump Jr. spent his time in India promoting Trump-branded luxury apartments across the country, while meeting with real estate brokers and potential buyers. *Id.* Donald Trump Jr. also committed to have dinner with homebuyers willing to pay a roughly \$38,000 booking fee. Compl. ¶ 14, Ex. D (citing Gowen, Annie, "Donald Trump Jr. says he admires India's poor people because of their spirit," The Washington Post, 21 February 2018).

Trump Jr. initially planned to deliver a 15-minute speech called "Reshaping Indo-Pacific ties: the new era of cooperation" while in India. Hours before this speech was scheduled to take place, the title was changed to a "fireside chat," and Trump Jr. was instead interviewed by journalist Supriya Shrinat about his experience as the son of the President of the United States and his views on India's business culture. Compl. ¶ 15, Ex. E (citing Safi, Michael, "Donald Trump Jr cancels US foreign policy speech in India," The Guardian, 23 February 2018).

Leading up to the planned speech, ethics experts questioned why Trump Jr. was to discuss US foreign policy on what was supposedly a business trip by a private citizen. Compl. ¶ 16, Ex. F (citing Abi-Habib, Maria, Kai Schultz and Suhasini Raj, "As Donald Trump Jr. Drums Up Business in India, Some Ask What's Being Sold," The New York Times, 22 February 2018).

According to The Washington Post, Indian newspapers ran advertisements that promised homebuyers who were willing to pay a \$38,000 booking fee to "join Mr. Donald Trump Jr. for a

1 conversation and dinner.” Compl. ¶ 17, Ex. G (citing Gowen, Annie, “Trump Jr. to give foreign
2 policy speech while on ‘unofficial’ business trip to India,” 19 February 2018).

3 Trump Jr.’s visit received widespread criticism for opening the door to possible corruption.
4 Jordan Libowitz, the communications director for Citizens for Responsibility and Ethics in
5 Washington, told The Washington Post, “Trump’s company is literally selling access to the president’s
6 son overseas. For many people wanting to affect American policy in the region, the cost of a condo is a
7 small price to pay to lobby one of the people closest to the president, far away from watchful eyes.”
8 Compl. ¶ 18 (citing Gowen, Annie, *supra*, “Trump Jr. to give foreign policy speech while on
9 ‘unofficial’ business trip to India,” 19 February 2018).

10 President Donald J. Trump remains the principal owner of his namesake business, The Trump
11 Organization, which oversees approximately 500 business entities. When he was elected President,
12 President Trump relinquished his role as chairman and president of the Trump Organization, but his
13 two adult sons, Donald Trump Jr. and Eric, stayed as executives. Compl. ¶ 19 (citing Fabian, Jordan,
14 “Trump to hand over business to sons,” The Hill, 11 January 2017; The Trump Organization, “The
15 Next Generation – Donald Trump Jr.,” <https://www.trump.com/the-next-generation/donald-trump-jr/>
16 (2018); The Trump Organization, “The Next Generation – Eric Trump,” [https://www.trump.com/the-](https://www.trump.com/the-next-generation/eric-trump/)
17 [next-generation/eric-trump/](https://www.trump.com/the-next-generation/eric-trump/) (2018). President Trump has maintained his ownership of the
18 organization).

19 **B. Mr. Kopp’s FOIA request was for records regarding potential conflicts of interest**
20 **regarding taxpayer funded costs for Donald Trump Jr.’s India Trip.**

21 As a concerned tax-payer, Mr. Kopp had reason to believe Trump Jr.’s visit was entangled in
22 conflicts of interest. *See*, Compl. ¶ 14. Experts say Trump Jr.’s visit demonstrates the danger of
23 President Trump’s failure to divest from his business. Compl. ¶ 20 (citing Abi-Habib, Maria and Eric
24 Lipton, *supra*, “Selling, Not Diplomacy Draws a Trump to India,” The New York Times).

25 Although the Secret Service is authorized to protect immediate family members of the
26 President, 18 U.S. Code §3056(a)(2), adult children of the President may decline Secret Service
27 protection, as former President Ronald Reagan’s adult son, Ron Reagan, did. Compl. ¶ 21 (citing
28

1 Werner, Anna, Pat Milton and Laura Strickler, “The cost to taxpayers of protecting Trump’s kids on
2 overseas business trips,” CBS Evening News, 27 February 2017).

3 Donald Trump, Jr.’s use of tax-payer funded Secret Service for his personal security during
4 private business trips abroad gives the appearance of an intertwining of the presidency of the United
5 States and the Trump Organization. Compl. ¶ 22.

6 Critics frequently complain of the high cost of Secret Service agents accompanying the Trump
7 children on private business trips, and thus straining the government agency’s budget and increasing
8 taxpayers’ costs, including Mr. Kopp’s. Compl. ¶ 23, Ex. H (citing Gowen, Annie, “Trump project in
9 India saw \$15 million in sales after buyers were offered dinner with Donald Trump Jr.,” The
10 Washington Post, 22 February 2018). For example, Secret Service protection for Eric Trump and
11 Donald Trump Jr. to open the Trump International Golf Course in Dubai in February 2017 cost over
12 \$200,000. Compl. ¶ 23, Ex. I (Cummings, William, “Watchdog: Secret Service for Eric, Donald
13 Trump Jr. trips cost \$230,000 in 1 month,” USA Today, 18 July 2018).

14 **C. Defendant U.S. Secret Service repeatedly failed to comply with its obligations**
15 **under the Freedom of Information Act.**

16 On February 27, 2018, Mr. Kopp submitted a request to the United States Secret Service under
17 FOIA for public records concerning the costs incurred by the Secret Service when it accompanied
18 Donald Trump Jr. on a business trip to and from India in February 2018. *See*, Declaration of Quentin
19 L. Kopp in Support of Plaintiff’s Motion for Attorney’s Fees (“Kopp Decl.”) ¶ 2, Ex. 1.

20 Mr. Kopp’s FOIA request to the U.S. Secret Service specifically requested public records
21 which showed: (1) the number of Secret Service personnel accompanying Donald Trump, Jr. on his
22 February 2018 India trip and their job descriptions; (2) the cost of the transportation, meals, lodging,
23 salaries, and all other emoluments for all Secret Service personnel on such trip; and (3) any rules of the
24 Secret Service relating to justification, responsibility, and duties of Secret Service detail members on
25 such trip, plus the dates of departure and return, of all such persons. *See* Kopp Decl. ¶ 2, Ex. 1.

26 On May 15, 2018, 24 days after receiving his letter, the Secret Service responded to Mr. Kopp
27 stating, “We have determined that your request is too broad in scope, or that your request did not
28 specifically identify the records which you are seeking.” Kopp Decl. ¶ 4, Ex. 2. The Secret Service’s

1 letter further stated, “As you have failed to reasonably describe the records you are seeking, your
 2 request is not a ‘perfected request,’ and we are unable to initiate a search for responsive records.” *Id.*
 3 Mr. Kopp was invited to “resubmit” his request with additional details within 30 days or his file would
 4 be administratively closed. *Id.*

5 On May 29, 2018, Mr. Kopp responded to the Secret Service’s letter, disagreeing that his
 6 request was too broad. Kopp Decl. ¶ 5, Ex. 3. He pointed out a FOIA request need only describe the
 7 records sought in sufficient detail to enable Secret Service Staff to identify them with a reasonable
 8 amount of effort, and that there was no requirement that a FOIA request identify the specific records at
 9 issue. *Id.* Indeed, such a requirement would be impossible to satisfy in most instances, as there is no
 10 way for a requester to know exactly the nature of existing responsive records.

11 Although Mr. Kopp’s February 27, 2018 request was adequate, his May 29, 2018
 12 correspondence provided further detail of the records sought for each request and provided examples
 13 of potentially responsive documents that might be in the Secret Service’s possession. *See*, Kopp Decl.
 14 ¶ 5, Ex. 3. Mr. Kopp requested the Secret Service respond to his May 29, 2018 letter within 30 days
 15 and requested any response clearly indicate whether his request was being denied. Kopp Decl. ¶ 5, Ex.
 16 3.

17 On August 14, 2018, over 50 business days after his May 29th letter, Mr. Kopp had not
 18 received any response from the Secret Service to his FOIA requests and initiated the instant litigation
 19 to compel the production of public records. *See*, Compl. ¶¶ 1, 11; *see also*, Kopp Decl. ¶¶ 7-8. Mr.
 20 Kopp had a statutory right to the records requested and there was no legal basis for Defendant’s refusal
 21 to disclose them.

22 **D. Only after Mr. Kopp filed the instant litigation did Defendant produce records.**

23 On September 21, 2018, Defendant made an initial production of 91 pages of records in
 24 response to Mr. Kopp’s FOIA request. *See*, Declaration of Mallory A. Barr in Support of Plaintiff’s
 25 Motion for Attorney’s Fees (“Barr Decl.”) ¶ 8.

26 Just three days later, on September 24, 2018, Defendant Answered Mr. Kopp’s Complaint.
 27 ECF 9. Defendant’s only affirmative defense was that “some or all of the requested documents and
 28

information are exempt from disclosure” under 5 U.S.C. § 552(b). ECF 9 at p. 4. Defendant provided no reasonable basis for its prior failures to comply with its obligations under FOIA.

In Defendant’s Answer, it claimed “the Secret Service made a final production of responsive, non-exempt documents” on September 21, 2018. ECF 9 at ¶ 11. However, on October 24, 2018, Defendant made a supplemental production of 5 pages of records. *See*, Barr Decl. ¶ 9. In total, Defendant produced 96 pages of records responsive to Mr. Kopp’s FOIA request after he was forced to file a complaint compelling production of documents.

Following Defendant’s productions of documents, counsel for Mr. Kopp initiated efforts to resolve the instant fee dispute. *See*, Barr Decl. ¶ 10. The protracted settlement discussions were unsuccessful. *Id.*

E. FOIA’s Attorney Fees provision is meant to facilitate access to information and compensate a requestor for an agency’s unreasonable delay in complying.

FOIA “was enacted to facilitate public access to Government documents,” *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009), and “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Judicial Watch, Inc. v. United States Dep’t of Homeland Security*, 895 F.3d 770, 780 (D.C. Cir. 2018); *see also*, *Carlson v. United States Postal Service*, Slip Copy, 2017 WL 3581136, at *9 (N.D. Cal. Aug. 18, 2017) (quoting the same).

Under FOIA, “each agency, upon request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A). To ensure the statute did not become a “dead-letter” statute, Congress required agencies to respond to requests within twenty business days. *See*, *Judicial Watch*, 895 F.3d at 774 (citing 5 U.S.C. § 552(a)(6)(A)). “In ‘unusual circumstances,’ the agency may extend the determination deadline by ten business days (two weeks) upon explaining the circumstances to the requester.” *Id.* (quoting 5 U.S.C. § 552(a)(6)(B)(i)). “If additional time is required to address the request, the agency ‘shall notify the [requester] ... and shall provide the person an opportunity to limit the scope of the

request ... or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* (quoting 5 U.S.C. § 552(a)(6)(B)(ii)).

Under FOIA, a “court may assess against the United State reasonable attorney fee and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). FOIA’s attorney fee provision was added out of concern that potential information requestors would be unable to secure adequate legal representation because there would be no financial incentive for an attorney to take on a FOIA case on a contingency basis. *See*, S. Rep No. 93-854, May 16, 1974, 93rd Cong., 2d Sess. Because FOIA’s basic policy is “to encourage the maximum feasible access to government information. . . . The attorney fees provision of the statute has as its fundamental purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights.” *Exner*, 443 F. Supp. at 1351 (S.D. Cal. 1978), *aff’d* 612 F.2d 1202 (9th Cir. 1980) (quoting *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977)); *see also First Amendment Coalition v. United States Dept. of Justice*, 878 F.3d 1119, 1126 (9th Cir. 2017) (quoting *Exner v. F.B.I.*, 443 F. Supp. 1349, 1351 (S.D. Cal. 1978)). “Congress realized that an allowance of fees and costs was necessary in FOIA actions to encourage full public disclosure of government information. Congress has made a clear determination that an award of attorney fees is appropriate and desirable whenever a complainant prevails in FOIA litigation.” *Exner*, 443 F. Supp. at 1352.

Thus, FOIA’s fee-shifting provision serves two purposes: (1) “to encourage [FOIA] suits that benefit the public interest” and (2) to serve “as compensation for enduring an agency’s unreasonable obduracy in refusing to comply with the [FOIA’s] requirements.” *LaSalle Extension Univ. v. Federal Trade Comm’n*, 627 F.2d 481, 484 (D.C. Cir. 1980). “[T]he award of FOIA counsel fees ‘has as its fundamental purpose the facilitation of citizen access to the courts,’ and should not be subject to ‘a grudging application.’” *First Amendment Coalition*, 878 F.3d at 1130 (quoting *Exner*, 443 F. Supp. at 1351-52).

F. Counsel met and conferred in compliance with Local Rule 54-5(B)(1)

Counsel for both parties have met and conferred for the purpose of attempting to resolve any disputes regarding this Motion. *See* Barr Decl. ¶¶ 10-11.

1 **III. ARGUMENT**

2 Under FOIA’s fee-shifting provision, a “court may assess against the United State reasonable
3 attorney feed and other litigation costs reasonably incurred in any case under this section in which the
4 complainant has substantially prevailed.” *Rosenfeld v. U.S. Dept. of Justice*, 904 F.Supp.2d 988, 993
5 (N.D. Cal. 2012) (quoting 5 U.S.C. § 552(a)(4)(E)). “Substantially prevailed” includes “a voluntary or
6 unilateral change in position by the agency, if the complainant’s claim is not insubstantial.” *Id.* at 993-
7 94 (N.D. Cal. 2012) (quoting 5 U.S.C. § 552(a)(4)(E)(ii)).

8 Fee and cost awards are awarded to a plaintiff who is both eligible and entitled to such an
9 award. *See, Rosenfeld*, 904 F.Supp.2d at 994; *see also, Church of Scientology of Cal. v. U.S. Postal*
10 *Serv.*, 700 F.2d 486, 489 (9th Cir. 1983), *abrogated in part by First Amendment Coalition v. United*
11 *States Dept. of Justice*, 878 F.3d 1119 (9th Cir. 2017); *see also, Long v. U.S. I.R.S.*, 932 F.2d 1309,
12 1313 (9th Cir. 1991). After the court determines a plaintiff is both eligible and entitled to an award of
13 its fees and costs, the plaintiff must submit its fee and cost bill to the court for determination of its
14 reasonableness. *See, Rosenfeld*, 904 F.Supp.2d at 994.

15 Mr. Kopp satisfies all of these elements and should be granted his requested attorneys’ fees and
16 costs of **\$41,884.95**.

17 **A. Mr. Kopp is eligible for an award of attorneys’ fees and costs because he** 18 **substantially prevailed in the litigation.**

19 Under FOIA’s fee-shifting provision, a “court may assess against the United State reasonable
20 attorney fees and other litigation costs reasonably incurred in any case under this section in which the
21 complainant has substantially prevailed.” *Rosenfeld*, 904 F.Supp.2d at 993 (quoting 5 U.S.C. §
22 552(a)(4)(E)). “Substantially prevailed” includes “a voluntary or unilateral change in position by the
23 agency, if the complainant’s claim is not insubstantial.” *Id.* (quoting 5 U.S.C. § 552(a)(4)(E)(ii). A
24 “voluntary or unilateral change in position” exists where “(1) the filing of the action could reasonably
25 have been regarded as *necessary* to obtain the information [and] (2) the filing of the action had a
26 *substantial causative effect* on the delivery of the information.” *See, Church of Scientology of Cal.*,
27 700 F.2d at 489, *abrogated in part by First Amendment Coalition*, 878 F.3d at 1130 (9th Cir. 2012017)

(explaining the factors articulated in *Church of Scientology* were relevant to determining when a requestor has “substantially prevailed”) (emphasis in original).

1. Mr. Kopp’s Complaint was necessary to obtain the information he requested.

In *Ginter v. I.R.S.*, the court concluded plaintiff’s suit was not reasonably necessary because at the time of filing suit, the IRS had been unable to locate the requested information and was in the process of conducting a special search. 648 F.2d 469, 471-3 (8th Cir. 1981).

Unlike *Ginter*, Mr. Kopp’s complaint was necessary to force Defendant to comply with its FOIA obligations. Mr. Kopp sent his initial request for documents to Defendant under FOIA on February 27, 2018. Kopp Decl. ¶ 4, Ex. 2. Not until May 15, 2018, well over 20 business days later, did Defendant even respond to Mr. Kopp’s request. Kopp Decl. ¶ 4, Ex. 2. Defendant’s initial response did not conform to the FOIA requirements: it was neither a final determination, a production, nor an explanation of “unusual circumstances” that would warrant additional time for a production of requested information. *See*, Kopp Decl. ¶ 4, Ex. 2. There was no indication that Defendant was undertaking any efforts to attempt to locate the records, that the records requested were too voluminous, or that the information requested was exempt from disclosure. *See*, Kopp Decl. ¶ 4, Ex. 2. Rather, it sought additional clarification of Mr. Kopp’s request, claiming without support that Mr. Kopp’s request for records detailing a 1-week trip were “too broad in scope.” *See*, Kopp Decl. ¶ 4, Ex. 2. Simply put, Defendant created an artificial barrier to producing the records, limiting both Mr. Kopp’s and public’s access to information.

In response to Defendant’s request for additional information, Mr. Kopp provided further detail to the agency on May 29, 2018. *See*, Kopp Decl. ¶ 5, Ex. 3. Mr. Kopp’s supplemental information was not returned to him as undeliverable mail. *See*, Kopp Decl. ¶ 6. Just as before, Defendant did not respond to Mr. Kopp’s request within 20 business days, as required by FOIA. *See*, Kopp Decl. ¶ 8. By August 14, 2018, over 50 business days from sending the supplemental request Defendant demanded, Defendant still had not responded to Mr. Kopp’s request. *See*, Kopp Decl. ¶ 8. Defendant’s arbitrary obstacle to producing records effectively turned Mr. Kopp’s request in to a “dead-letter.”

Notably, Defendant's initial response stated "this is not a denial of your request" but required Mr. Kopp to supplement his requests within 30 days or his file would be closed. *See*, Kopp Decl. ¶ 4, Ex. 2. If Defendant did not receive Mr. Kopp's supplemental requests within the time required, Defendant should have sent Mr. Kopp a formal administrative closure letter or denied his request and stated the supporting statutory bases. *See*, Kopp Decl. ¶ 4, Ex. 2. Defendant took no such action. *See*, Kopp Decl. ¶¶ 7-8. Instead, Defendant's initial non-compliance with the FOIA requirements created a request-limbo for Mr. Kopp's request to languish in indefinitely, necessitating Mr. Kopp's filing of his FOIA complaint to compel a response. His supplemented request had become a "dead-letter," the exact situation Congress intended to avoid by imposing time limits on an agency for responding to a request.

Thus, Mr. Kopp's FOIA complaint was necessary to obtain the information he requested.

2. Mr. Kopp's Complaint was a substantial causative effect of Defendant's production of information.

Where a "sufficient causal nexus exists between [Plaintiff's] litigation and the release of the documents," that is enough to "warrant a determination that [Plaintiff] is eligible for attorney[s'] fees." *Fund for Constitutional Gov't v. National Archives & Records Services*, 656 F.2d 856, 872 (D.C. Cir. 1981). "[T]he mere fact that defendant[] voluntarily released documents [during the pendency of litigation] does not preclude an award of attorney's fees to the plaintiff." *Church of Scientology of Cal.*, 700 F.2d at 492 (emphasis in original). Indeed, "'timing' can directly inform whether a 'causal nexus exists between the litigation and [defendant's] surrender of [] documents.'" *Rosenfeld*, 904 F.Supp.2d at 994.

"Where sought-after FOIA documents are released during litigation, a court must examine (1) when the documents were released; and (2) what actually triggered the documents' release" to assess whether a plaintiff "substantially prevailed." *Rosenfeld*, 904 F.Supp.2d at 996 (quoting *Church of Scientology of Cal.*, 700 F.2d at 489). The court must also examine "whether [the plaintiff] was entitled to the documents at an earlier time." *First Amendment Coalition*, 878 F.3d at 1129.

Defendant did not produce documents to Mr. Kopp until September 21, 2018, over a month after Mr. Kopp filed his Complaint. *See*, Barr Decl. ¶ 8. A supplemental batch of records was

1 produced on October 24, 2018, despite Defendant stating in its Answer that production was complete
 2 in September. *See*, Barr Decl. ¶ 9. But for Mr. Kopp filing his Complaint, his request would have
 3 remained in limbo; Defendant made no effort to produce records or deny Mr. Kopp's request for
 4 information as required by FOIA. Defendant never indicated a search for responsive records was
 5 underway or there were exemptions from production that were in issue prior to Mr. Kopp filing his
 6 Complaint. *See*, Kopp Decl. ¶ 8. Defendant only produced documents after being served with Mr.
 7 Kopp's Complaint. Moreover, Defendant's productions were not exceptionally voluminous and
 8 routinely redacted, indicating they could have and should have been produced in response to Mr.
 9 Kopp's original FOIA request in February. There was no need for the added burden inflicted on Mr.
 10 Kopp to provide more detail to his initial request; the documents were sufficiently ascertainable when
 11 originally requested and there was no undue burden on Defendant to produce the records. Mr. Kopp's
 12 Complaint thus had a substantial causative effect on Defendant producing records.

13 Therefore, Mr. Kopp's Complaint was necessary for and a substantial causative effect on the
 14 production of documents in response to his FOIA request. As such, Mr. Kopp has substantially
 15 prevailed on his Complaint and is thus eligible for an award of attorneys' fees and costs.

16 **B. Mr. Kopp is entitled to an award of attorneys' fees and costs.**

17 "The decision to award attorney's fees is left to the sound discretion of the trial court." *Church*
 18 *of Scientology of Cal.*, 700 F.2d at 492. The court evaluates a number of equitable factors to determine
 19 whether a Plaintiff is entitled to an award of his attorney's fees. *Rosenfeld*, 904 F.Supp.2d at 994,
 20 (citing *Long v. U.S. I.R.S.*, 932 F.2d 1309, 1313 (9th Cir. 1991)). "[T]he court may take into
 21 consideration whatever factors it deems relevant in determining whether an award of attorney's fees is
 22 appropriate." *Long*, 932 F.2d at 1313. Such factors may include: (1) the public benefit resulting from
 23 FOIA disclosures in the case, (2) the commercial benefit to the party resulting from the disclosures, (3)
 24 the nature of the party's interest in the disclosed records, and (4) whether the government's rationale
 25 for withholding the records had a reasonable basis in law. *Rosenfeld*, 904 F.Supp.2d at 994 (citing
 26 *Long*, 932 F.2d at 1313).

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28 ///

1 1. Mr. Kopp sought the information for a public benefit.

2 A FOIA action results in a public benefit if a Plaintiff's victory is "likely to add to the fund of
3 information that citizens may use in making vital political choices." *Cotton v. Heyman*, 63 F.3d 1115,
4 1120 (D.C. Cir. 1995) (quoting *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978)); *see*
5 *also, Church of Scientology of Cal.*, 700 F.2d at 493 (also citing *Blue*). A public benefit also exists in
6 urging government compliance with statutory functions. *See, O'Neil, Lysaght & Sun v. Drug*
7 *Enforcement Administration*, 951 F. Supp. 1413, 1424 (C.D. Cal. 1996).

8 Mr. Kopp's request for information was for public benefit. News outlets and watchdog groups
9 were interested in the tax-payer costs of the Secret Service providing security details for President
10 Trump's adult children traveling abroad to promote the Trump business entities. *See, generally,*
11 Compl. ¶¶ 13-23 and attached exhibits. Mr. Kopp's request was for a specific trip which attracted
12 scrutiny because India's prime minister attended a dinner where Donald Trump Jr. was scheduled to
13 give a policy speech. *See, Compl. ¶ 15, Ex. E.* This apparent interwinding of personal business and
14 political connections continue to dominate headlines and political discussion around the country.

15 When Defendant produced documents to Mr. Kopp, it was cross-checked with similar
16 information obtained by *The Washington Post* journalist Annie Gowen. *See, Barr Decl. ¶ 7 and Ex. 2.*
17 Ms. Gowen previously reported on Trump Jr's India trip. *See, Barr Decl. ¶ 7 and Ex. 2; see also,*
18 Compl. ¶ 14, *Ex. D.*

19 Mr. Kopp's request thus added to the fund of information available to citizens in making vital
20 political decisions.

21 2. Mr. Kopp received no commercial benefit and his interest in the information
22 sought was for a public interest.

23 "The commercial benefit to the party resulting from disclosures and the nature of the
24 plaintiff[s] interest are closely related and often considered together." *The Sierra Club v. United*
25 *States Environmental Protection Agency*, 75 F.Supp.3d, 1125, 1142 (N.D. Cal. 2014) (quoting *Church*
26 *of Scientology of Cal.*, 700 F.2d at 494). "Both factors are intended to distinguish cases in which the
27 claimant has a clear pecuniary interest in seeking disclosure, so that there is no need for an added
28 incentive to bring a claim under the Act, from those where it is unlikely that a claim would have been

brought absent the high probability that fees and costs of suit would be awarded against the intransigent agency.” *United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Local 598 v. Dept. of Army Corps of Engineers*, 841 F.2d 1459, 1461 (9th Cir. 1988), *abrogated in part by First Amendment Coalition v. United States Dept. of Justice*, 878 F.3d 1119 (9th Cir. 2017).

If Plaintiff “realized no commercial benefit from [a disclosure of information], it does not follow that this factor should be disregarded . . . On the contrary, it would weigh in favor of a fee award, since the fee award section of the Act was intended to encourage complainants who lack substantial pecuniary incentives to pursue their claims.” *Local 598*, 841 F.2d at 1461-62 (emphasis added, citations omitted). Congress envisioned Plaintiffs advocating in the public’s interest and encouraged this vision with the Act’s attorney fee provision: “If the commercial benefit from disclosure was remote or unlikely, the presumes that the fee award was a necessary encouragement.” *Id.* at 1462. Courts should also award fees if the Plaintiff’s interest in the information sought was public-oriented. *See, Long v. U.S. I.R.S.*, 932 F.2d 1309, 1316 (9th Cir. 1991).

Mr. Kopp has no commercial or pecuniary interest in the information. *See*, Kopp Decl. ¶ 3. To the contrary, as noted above, Mr. Kopp’s request was of public interest, dealing with important and novel political issues of the day that were well covered by the news media.

Thus, it is presumed the fee award was a necessary encouragement for Mr. Kopp to engage counsel and file his Complaint.

3. The Defendant does not have a reasonable basis at law for failing to comply with its FOIA obligations.

Defendant’s denial of – or non-response – to a FOIA request must have a colorable basis in law and not merely for the purpose of frustrating the requester. *See, Rosenfeld v. U.S. Dept. of Justice*, 904 F.Supp.2d 988, 999 (N.D. Cal. 2012). The government bears the burden of demonstrating its conduct was reasonable. *See, Davy v. C.I.A.*, 550 F.3d 1155, 1162-63 (D.C. Cir. 2006). A fee award is appropriate if the government’s withholding was without a reasonable basis in law. *See, Church of Scientology of Cal. v. U.S. Postal Serv.*, 700 F.2d 486, 492 n.6 & 494 (9th Cir. 1983). The government agency “must be careful not to read the request so strictly that the requester is denied information the

1 agency well knows exists in its files.” *See, Rosenfeld*, 904 F.Supp.2d at 999 (quoting *Hemenway v.*
 2 *Hughes*, 601 F. Supp. 1002, 1005 (D.C. Cir. 1985)).

3 Defendant’s initial response to Mr. Kopp’s FOIA request was sent 24 business days after it was
 4 received and therefore not in compliance with the 20-day response required. 5 U.S.C. § 552(a)(6)(A).
 5 Defendant’s tardy response was not a denial or explanation of withholding under any of FOIA’s
 6 exemptions from production. Kopp Decl. ¶ 4, Ex. 2. At no point did Defendant avail itself of the
 7 opportunity to invoke the “unusual circumstances” decision deadline extension beyond the 10 business
 8 days afforded in limited circumstances. 5 U.S.C. § 552(a)(6)(B). Instead, Defendant required more
 9 specific information about the requests sought, although Mr. Kopp’s original requests were narrowly
 10 tailored to records regarding its employees’ protection detail for a single trip for a single person.
 11 Defendant knew this information existed in its files yet force Mr. Kopp to go through the added burden
 12 of adding more unnecessary detail. Yet, even after Mr. Kopp supplemented his request in response to
 13 Defendant’s letter, he received no response at all. *See*, Kopp Decl. ¶¶ 7-8. As such, there was no basis
 14 at law for Defendant to withhold the documents properly requested by Mr. Kopp.

15 Therefore, Mr. Kopp is entitled to an award of attorneys’ fees and costs.

16 **C. Mr. Kopp’s request for attorneys’ fees and costs is reasonable.**

17 Pursuant to 5 U.S.C. § 552(a)(4)(E), Mr. Kopp requests \$41,884.95 in fees and costs based on
 18 the detailed accounting of all costs of litigation and attorneys’ fees. *See*, Barr Decl. ¶¶ 3-8. This
 19 represents litigation expenses of \$1,284.95 and a lodestar for attorneys’ fees of \$40,600. Mr. Kopp’s
 20 lodestar figure also includes compensation for time spent securing the fee award. *See, Davis v. City &*
 21 *County of San Francisco*, 976 F.2d 1536, 1544 (9th Cir. 1992), *vacated in part on other grounds*, 984
 22 F.2d 345 (9th Cir. 1993).

23 After a court determines Plaintiff is both eligible and entitled to receive fees, “the award must
 24 be given and the only room for discretion concerns the reasonableness of the amount requested.”
 25 *Rosenfeld v. U.S. Dept. of Justice*, 904 F.Supp.2d 988, 994 (N.D. Cal. 2012) (quoting *Long v. U.S.*
 26 *I.R.S.*, 932 F.2d 1309, 1313-14 (9th Cir. 1991)). To evaluate the reasonableness, Plaintiff “must submit
 27 his fee bill to the court for its scrutiny of the reasonableness of (a) the number of hours expended and
 28 (b) the hourly fee claimed.” *Id.* Under this “lodestar” method, if those two figures are reasonable, then

1 there is a strong presumption that their product, the lodestar figure, represents a reasonable award.
 2 *See, Blum v. Stenson*, 465 U.S. 886, 897 (1984); *see also, Long v. U.S. I.R.S.*, 932 F.2d 1309, 1314 (9th
 3 Cir. 1991).

4 “In light of the fact that ‘awarding attorneys’ fees to prevailing parties . . . is a tedious
 5 business,’ the court ‘should normally grant the award in full’ if the party opposing the request ‘cannot
 6 come up with specific reasons for reducing the fee request.’” *The Sierra Club v. United States*
 7 *Environmental Protection Agency*, 75 F.Supp.3d, 1125, 1147 (N.D. Cal. 2014) (quoting *Moreno v.*
 8 *City of Sacramento*, 534 F.3d 1106, 1116 (9th Cir. 2008)).

9 1. The number of hours claimed by Mr. Kopp is reasonable.

10 Under federal fee-shifting statutes, Plaintiff’s counsel is entitled to be compensated “for every
 11 item of service which, at the time rendered, would have been undertaken by a reasonable and prudent
 12 lawyer to advance or protect h[er] client’s interest.” *Moore v. James H. Matthews & Co.*, 682 F.2d
 13 830, 839 (9th Cir. 1982) (discussing such statutes in the anti-trust context).

14 Mr. Kopp’s counsel, Cotchett, Pitre & McCarthy, LLP (“CPM”), expended 81.8 hours of time
 15 into this matter. Barr Decl. ¶ 2, Ex. 1. That time was necessary, proper, and reasonable. The hours
 16 claimed by Mr. Kopp are described fully in the supporting declaration of counsel and supporting
 17 contemporaneous time records as required by Local Rule 54-5(b)(2). Barr Decl. ¶¶ 2-4, Exs. 1-2.

18 Thus, the hours Mr. Kopp is requesting reimbursement for are reasonable.

19 2. CPM’s billing rates are consistent with the prevailing rates in the community.

20 Mr. Kopp seeks reimbursement at rates between \$275 (case assistant) to \$850 (partner).

21 A reasonable hourly rate is determined by the prevailing marked rate in the community, i.e., the
 22 forum in which the district court sits, for similar services by lawyers of reasonably comparable skill,
 23 experience, and reputation. *See, The Sierra Club v. United States Environmental Protection Agency*,
 24 75 F.Supp.3d, 1125, 1153 (N.D. Cal. 2014) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96, n. 11
 25 (1984) and *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008)).

26 Mr. Kopp seeks reimbursement for attorneys Justin T. Berger’s time at an hourly rate of \$800,
 27 Adam M. Shapiro’s time at an hourly rate of \$600 for work performed in 2018. For attorney Mallory
 28 A. Barr, Mr. Kopp seeks time at an hourly rate of \$425 for work performed in 2018 and 2019. Mr.

Kopp seeks the hourly rate of \$275 for case assistant Madeline Kerr and for senior paralegal Valerie Barretto, Mr. Kopp seeks the hourly rate of \$325. These rates are CPM's regular hourly rates charged to hourly paying clients. Barr Decl. ¶ 5; Local Rule 54-5(b)(2).

The following table summarizes Mr. Kopp's claim for reimbursement:

Name	Role	Hourly Rate	Hours Requested	Fees
Justin T. Berger	Partner	\$850	13.6	\$11,560
Adam M. Shapiro	Senior Associate	\$600	4.4	\$2,640
Mallory A. Barr	Associate	\$425	57.9	\$24,607.50
Valerie Barretto	Senior Paralegal	\$325	3.4	\$1,105
Madeline Kerr	Case Assistant	\$275	2.5	\$687.50

CPM's hourly rates are similar to those charged by attorneys of comparable skill, experience, and reputation in this community for similar work. *See*, Barr Decl. ¶ 4. The Northern District of California routinely awards attorneys' fees in FOIA matters at rates equal or comparable to CPM's rates. *See, e.g., The Sierra Club v. United States Environmental Protection Agency*, 75 F.Supp.3d, 1125, 1152-53 (N.D. Cal. 2014) (awarding fees at up to \$650); *Rosenfeld v. U.S. Dept. of Justice*, 904 F.Supp.2d 988, 1004 (N.D. Cal. 2012) (awarding fees at up to \$700); *Hajro v. U.S. Citizenship & Immigration Services*, 900 F.Supp.2d 1034, 1054 (N.D. Cal. 2012), *vacated and remanded on other grounds*, 811 F.3d 1086 (9th Cir. 2016) (awarding fees at up to \$625).

Further, CPM's rates are in line with the rates that have recently been awarded to similarly experienced counsel in this district. *See, e.g., Fowler v. Wells Fargo Bank, N.A.*, No. 17-CV-02092-HSG, 2019 WL 330910, at *7 (N.D. Cal. Jan. 25, 2019)(attorney rates between \$300 per hour and \$850 per hour for associates and partners were reasonable); *Hefler v. Wells Fargo & Co.*, 2018 WL 661983, at *14 (N.D. Cal. Dec. 18, 2018)(rates "from \$650 to \$1,250 for partners or senior counsel, from \$400 to \$650 for associates, and from \$245 to \$250 for paralegals" were reasonable)(citing *In re Volkswagen "Clean Diesel" Mktg. Sales Practices & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017)).

Justin T. Berger has twelve years of litigation experience and has been recognized as one of the top young litigators in California. *See*, Barr Decl. ¶ 12, Ex. 4. He has litigated dozens of civil actions, including False Claims Act cases, consumer protection class action cases, and financial elder abuse cases. *See*, Barr Decl. ¶ 12, Ex. 4. Mr. Berger has received numerous awards throughout his career for his skills, including the California Lawyer Magazine Attorney of the Year (CLAY) Award, along with

1 Niall McCarthy, in 2012 and was twice selected as a finalist for the Consumer Attorney of the Year
 2 Award by the Consumer Attorneys of California. *See*, Barr Decl. ¶ 12, Ex. 4. Mr. Berger received his
 3 Bachelor of Arts from Yale University, graduating Cum Laude, with Honors in the Major and his J.D.
 4 from the University of California, Berkeley School of Law (Boalt Hall). *See*, Barr Decl. ¶ 12, Ex. 4.
 5 Following law school, Mr. Berger clerked for U.S. District Court Judge Susan Illston of the Northern
 6 District of California. *See*, Barr Decl. ¶ 12, Ex. 4.

7 Adam M. Shapiro has nine years of litigation experience. *See*, Barr Decl. ¶ 12, Ex. 4. Before
 8 joining CPM, Mr. Shapiro was a Senior Staff Attorney for the California Court of Appeal and a clerk
 9 for the Honorable Samuel Conti at the United States District Court for the Northern District of
 10 California. *See*, Barr Decl. ¶ 12, Ex. 4.

11 Mallory A. Barr is an associate with over 8 years of experience working in litigation. Barr
 12 Decl. ¶¶ 12-13, Ex. 4. Although she is a newer attorney, she comes to the role with over seven years
 13 of experience working in litigation and has been involved in multiple complex cases. *See, id.*

14 Senior Paralegal Valerie Barretto began working as a paralegal in 2008. *See*, Barr Decl. ¶ 14.
 15 She received her Paralegal Certificate in 2013 from San Francisco State University. *See, id.* Mrs.
 16 Barretto has been working at CPM since 2012 and was promoted to Senior Paralegal in 2017. *See, id.*
 17 In her role as a Senior Paralegal, she provides advanced-level comprehensive litigation support to the
 18 office and has an advanced level of knowledge and proficiency in all aspects of civil litigation. *See, id.*

19 The qualifications and experiences of counsel are described fully in the supporting declaration
 20 of counsel and supporting documents attached thereto as required by Local Rule 54-5(b)(3). Barr
 21 Decl. ¶¶ 12-14, Ex. 4.

22 Therefore, Mr. Kopp's lodestar amount of \$40,600 is reasonable and he should be fully
 23 compensated for the time he is requesting.

24 3. Mr. Kopp's costs are reasonable.

25 Costs of litigation are authorized under 5 U.S.C. § 552(a)(4)(E) and should be awarded to Mr.
 26 Kopp. Out of pocket expenses are recoverable as part of attorneys' fees. *See, United Steelworkers of*
 27 *America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990), *opinion amended*, 808 F.2d 1373
 28 (9th Cir. 1987) (citing *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1216 n.7 (9th Cir. 1986)); *see*

also, *Kuzma v. I.R.S.*, 821 F.2d 930, 933 (2d Cir. 1987) (recognizing FOIA's litigation cost provision permits broader recovery than the taxable cost provision of 28 U.S.C. § 1920).

The *Chalmers* court defined out-of-pocket expenses as "expenses incurred by an attorney which would normally be charged to a client." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1216 n.7 (9th Cir. 1986), *amended in part and rehearing denied*, 808 F.2d 1373 (9th Cir. 1987). Costs of photocopying, travel, and telephone expenses can also be included as attorney fees. *See, Thornberry v. Delta Airlines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983); *see also, Kuzma*, 821 F.2d at 933-34 (2d Cir. 1987).

Mr. Kopp incurred **\$1,284.95** in costs in this case. Barr Decl. ¶ 6, Ex. 3. The below table categorizes those expenses:

<u>Category of Expense</u>	<u>Amount Billed</u>
Court Costs	\$24.45
Federal Express	\$28.90
Lexis/Nexis	\$80.22
In-house Photocopies	\$187.60
Postage	\$39.64
Service of Process	\$456.00
Travel	\$468.14
TOTAL	\$1,284.95

Barr Decl. ¶ 6, Ex. 3.

Therefore, the Court should grant Mr. Kopp all of his out-of-pocket expenses sought in this litigation.

IV. Conclusion

For the foregoing reasons, Mr. Kopp respectfully asks the Court to issue an Order awarding \$40,600 in attorneys' fees and reimbursement of \$1,284.95 in litigation expenses.

Dated: March 22, 2019

COTCHETT, PITRE & McCARTHY, LLP

By: /s/ Mallory A. Barr
MALLORY A. BARR

Attorneys for Mr. Kopp Quentin L. Kopp